Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-981

In the Matter of the Complaint of

MORAN INLAND WATERWAYS CORPORATION, as owner, and MORAN TOWING & TRANSPORTATION CO., INC., as chartered owner of Tug Margot Moran,

Petitioners,

for exoneration from or limitation of liability.

SEABOARD SHIPPING CORPORATION, Claimant,

Respondent.

In the Matter of the Complaint of

SEABOARD SHIPPING CORPORATION, as owner of the Barge Oil Transfer 32,

Respondent,

for exoneration from or limitation of liability.

MORAN INLAND WATERWAYS CORPORATION and MORAN TOWING AND TRANSPORTATION CO., INC., Claimants,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners Moran Inland Waterways Corporation and Moran Towing & Transportation Co., Inc. respectfully pray that a Writ of Certiorari be issued to review the judgment

and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 29, 1971.

Opinion Below

The opinion of the Court of Appeals is reported at 449 F.2d 132 and a copy is annexed hereto marked Appendix A. The opinion of the District Court for the Southern District of New York is reported at 320 F. Supp. 229 (1970) and a copy is appended hereto marked Appendix B.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 29, 1971. A timely petition for rehearing en banc was denied November 8, 1971, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Where the District Court has closely scrutinized the several navigational decisions of the experienced tug master in command of a tug with a hawser tow across Lake Michigan in November and, refusing to apply hindsight as the test, made meticulous Findings as to each and found that they were neither unreasonable nor negligent, and held that the tug and petitioners were not liable for the deaths of the two crew men of the barge who left the security of their cabin and went on deck for no apparent reason and were lost overboard when a winter storm unexpectedly and severely changed direction and increased in intensity,

may the Court of Appeals reverse the thoroughly supported Findings, apply hindsight and its own notions as to what is proper navigation, and hold the long-experienced and well-qualified tug master negligent and his employers liable for the deaths?

Statement of the Case

On October 31, 1966, tank barge OT 32 finished loading a cargo of benzine at Lemont, Illinois, and was taken in tow by tug MARGOT MORAN bound for Bay City, Michigan, via Chicago. They reached Chicago the same day but remained overnight because of threatening weather. On November 1 they departed for Bay City. In the following days, increasingly severe weather was encountered and, at daybreak of November 4, the barge was seen to be down by the stern. Prompt investigation disclosed that her crew of two tankermen was missing.

Claims were made against the two companies which, respectively, owned and bareboat-chartered the tug (hereafter "Moran") and against Seaboard Shipping Corporation ("Seaboard"), which owned and operated the barge, for the deaths. Seaboard filed a limitation proceeding in the Eastern District of New York and Moran filed a like proceeding in the Southern District. Upon Morans' motion, Seaboard's proceeding was transferred to the Southern District.

Claims were made in both proceedings for the deaths of Arthur Naess and Charles Thompson, the certificated tankermen who were the crew of the barge. Moran filed a claim against Seaboard in Seaboard's proceeding and Seaboard filed claim against Moran in Morans' proceeding.

Moran and Seaboard settled the death claims and each advanced an agreed amount pursuant to a stipulation and order under which neither admitted any liability, but in which each reserved its right to claim against the other the sums so advanced.

Statement of the Facts

In early November, 1966 Arthur Naess and Charles Thompson were lost from the barge O.T. 32 during an extremely severe storm while the barge was in tow of tug MARGOT MORAN (MARGOT) on Lake Michigan. Seaboard was owner and operator of the barge.

No. 32 is a steel tank barge 229.4′ long by 42.9′ wide by 14.3′ deep without propulsion power. On October 30, 1966 she had loaded a cargo of benzine at Lemont, Illinois for Bay City, Michigan. On October 31, she was pushed from Lemont to Chicago by the MARGOT, a steel tug 84.8′ long by 24′ beam by 9.6′ deep which carried a crew of 7, including Chester MacDonald, her Captain. The officers of the tug and the crews of both tow and tug were thoroughly experienced and well qualified.

The trip from Lemont to Chicago was uneventful. Gale warnings for Lake Michigan prompted Captain MacDonald to remain at Chicago. The next morning, although gale warnings were still in effect, the actual weather conditions at Chicago, as well as at Milwaukee, 75 miles up the west shore of the Lake, were quite moderate. With winds coming from the northwest, MacDonald determined that there would be no risk as long as he remained in the lee of the west shore. Accordingly the MARGOT pushed No. 32 onto Lake Michigan and took her in tow on a 1200 foot hawser.

During he day there was intermittent heavy snowfall, the seas increased, and towing speed was reduced. At 0930 November 2, MacDonald changed course to cross the Lake from Sheboygan to Big Sable Point on the east shore, to head into the wind and seas which had shifted to NE. The barge appeared to be riding well and there was no reason to fear for her safety.

At 1800 November 2, the cabin lights of the barge were visible, and at day-break November 3 they were still visible. The flotilla had continued to experience NE winds and seas. At 0600 November 3, when the tow was ten miles off Big Sable Point, the wind shifted to NW and Captain MacDonald changed course to head into the seas, back towards the west shore, because the approaches to the east shore harbors were so oriented that the tug and barge could not safely enter them in the NW weather.

About 0700 November 3 the barge was seen to be riding and following well. No distress signals from her were seen but the lifeboat was seen to be athwartship instead of in its regular fore and aft position. The MARGOT, substantially smaller than the barge, was proceeding at reduced speed and was in no difficulty. By mid-afternoon November 3 the wind was about 50 knots, gusting to 65, with seas of about 15 feet. The MARGOT had no alternative but to proceed, heading into the seas to minimize the effect on the flotilla.

At 1530 November 3, No. 32's liferaft was found, fully inflated, floating ashore at Big Sable Point. No one was aboard. This was, of course, not known to those aboard the MARGOT at that time.

At 1830 November 3 the snow stopped. The flotilla was then 20 miles WSW of Point Betsie Light on the east

shore. No lights were visible on the barge because, as those on the tug thought, the bargemen were asleep. The flotilla continued into slowly diminishing NW seas to arrive off the west shore at daybreak, November 4. When it became light the bow of No. 32 was seen to be riding high. At 0800 the hawser was hauled and the mate of the tug boarded the barge. He found the after deck awash, the cabin door ajar about 1" and the cabin filled with water. The lifeboat and liferaft were missing. The deck was in a shambles with a broken port boom, cargo hoses hanging over the side, cowl ventilators missing and pump and engine rooms flooded. The two tanker men were missing.

The tug notified the Coast Guard and proceeded to Sturgeon Bay. There No. 32's pump room, engine room and cabin were pumped out. There was no damage to her hull or her cargo which was later outturned intact at Bay City, November 7.

The body of Captain Naess was found on the beach on the east shore of Lake Michigan on November 20. He had died from drowning. The body of Mate Thompson was never found.

The District Court's Decision

The Court held that Captain MacDonald's conduct was neither unreasonable nor negligent and that Seaboard could not recover from Moran what it paid in settlement of the death claims, or the cost of repairing the damage sustained by No. 32 during the storm.

The Court held that Seaboard warranted the seaworthiness of the barge, and had breached that warranty in half a dozen material respects but held that Moran could not

recover from Seaboard because it had failed to prove a causal connection between Seaboard's numerous derelictions and the deaths.

The Court of Appeals Decision

The Court of Appeals had no trouble in reversing as to Seaboard's faults, holding that these were causally related to the deaths and damage and holding Seaboard liable. However, in violation of the "clearly erroneous" rule laid down by this Court in *McAllister* v. *United States*, 348 U.S. 19 (1954), and its numerous progeny, the Court overturned Findings of the District Court which had been accepted by Seaboard and, on the basis of its own view of the facts, held Moran at fault by second-guessing the tug captain's navigational decisions on the basis of hindsight.

This enabled the Court to reach the question of contribution between tort-feasors in non-collision cases in admiralty and it decreed contribution between Moran and Seaboard as to the deaths as well as the property damage despite what some have thought was the meaning of *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

REASONS FOR GRANTING THE WRIT

I.

District Court Findings Not Accepted.

The Court of Appeals held the tug only for turning to head across the lake at 0930 November 2 (when off Sheboygan) to get under the lee of the east shore when the wind shifted to N.E. contrary to the forecasts. The essence of the Court's reasons are these: We have added the bold numerals in [ ]s to facilitate reference in the text that follows; the italics are ours:

> **[1]** "* * * the attempt to cross Lake Michigan in early November and to do so in the face of *increasingly bad weather reports* we think negligent. * * *
>
> **[2]** we think the Margot should have *made for safe haven,* rather than *risk the northeaster,*
>
> **[3]** only to be *exposed inevitably to the wind shift to northwest* once the Margot made Big Sable and the eastern shore" (*infra,* 11a).

[1] The weather reports were not "increasingly bad" when the tug turned to cross the lake at 0930 November 2. The 0410 broadcast had been for N. to N.E. winds 20-27 knots with only small craft* warnings in effect, and the 1010 forecast was for N.E.-N. winds of 22-32 knots, an increase of *five knots at most.* Only "small craft" warnings were up.

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* This tug and barge are not small craft. Small craft are "pleasure craft, small sailboats, cruisers operated for pleasure—perhaps small fishing boats—craft of this nature".

The District Court found that this course change was made "so that the flotilla would head into the weather and seas" and was "not unreasonable". Finding 13 (*infra*, 21a). The Court of Appeals decision reverses that Finding although the evidence fully supported it and Seaboard expressly accepted it.

Not until 1330 was there any significant change in forecast; then the forecast was for gale warnings effective at 1500 with N. winds 35-45 knots on the south half of the lake and 23-32 knots on the north half. The tug was then only slightly below the dividing line between north and south. The District Court found that when the tug changed course to cross the lake:

> "Winds were still from the northeast and no shift to the northwest was forecast or anticipated at that time. The O.T. 32 had consistently appeared to be riding well and there was no reason to be apprehensive about her safety. Thus, MacDonald continued to cross the lake to make the lee on the east shore". Finding 14 (*infra*, 21a).

It further found that the decision to continue across and not to turn back was "not unreasonable" and Seaboard accepting this Finding (*infra*, 21a).

The Court of Appeals rejected this Finding without claiming any lack of evidence to support it and made a contrary Finding contrary to the evidence.

[2] There was no need to make for "safe haven" rather than "risk the northeaster" and the Court of Appeals upset another Finding. Four hours after the tug started across the lake the wind was still N.E. and the barge "had con-

sistently appeared to be riding well and there was no reason to be apprehensive about her safety". Finding 14 (*infra*, 21a). The District Court found that at midnight (0000 November 3) the wind and sea were still N.E. and the flotilla was proceeding "without apparent difficulty". These are Findings; accepted by Seaboard and fully supported by evidence. Findings 14-16 (*infra*, 21a-22a).

Moreover, it was not the "northeaster" that caused the *casualty; it was the fury of the northwest* wind. The Court of Appeals accepted the Finding that the cause of the deaths was the violent winds and seas "which were encountered during the final northwesterly leg of the voyage" (*infra*, 12a).

[3] A wind shift to northwest was not "inevitable." On the contrary it was neither forecast nor anticipated. The District Court found that as late as 1330 November 2 "no shift to the northwest was forecast or anticipated". Finding 14. (*infra*, 21a). The first mention of northwest winds came with the broadcast at 1610 November 2 with the forecast of northeasterly winds "becoming northwesterly" the *next day* [Nov. 3]. The 1800 MAFOR* forecast a shift to the northwest *after* 0600 November 3. Moreover, the District Court expressly found that "There is *no evidence that it was possible at this point to return the flotilla to the west shore and Seaboard makes no such claim.*" Finding 15 (*infra*, 21a). And again, the District Court found that during the night of November 2-3 the flotilla "proceeded without apparent difficulty toward Big Sable Point" and had arrived within 10 miles of it at 0600 November 3 when the wind shifted to N.W. Findings 15 and 16 (*infra*, 21a-22a).

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* A MAFOR is a weather broadcast in code specially designed for shipping.

The Court of Appeals predicated its reversal on the facts on the erroneous view that the tug's barometer, if calibrated for the Lakes, "*might* have given him quicker warning of the erratic track of the storm" (*infra*, 10a). This is diametrically opposed to Finding 33 of the District Court which was fully supported (Finding 33, *infra*, 27a).

Where, as here, the District Court has found the facts in detail with meticulous care (*infra* 16a-24a) and where Seaboard has expressly stated that it "takes no exception" to these Findings the Court of Appeals should not be permitted to reverse on the facts without first demonstrating that the Findings were "clearly erroneous"; nor should it disregard the rule that hindsight may not be used in judging the considered navigational decisions of a qualified and experienced navigator.

The tender care which the Court of Appeals would require of the MARGOT for the barge was probably prompted by its misconception that No. 32 was a "mute and helpless" "inland waterway barge" (*infra*, 3a, 12a) in a "big tough lake" in tow of a "venturesome" tug (*infra*, 11a). Actually she was certificated by the U. S. Coast Guard as a "seagoing" barge licensed for ocean service coastwise. The lake did practically no damage to the barge. Her hull was unscathed; apart from damage to a stanchion or two the only damage she suffered was due to the failure of her crew to secure the gear on her deck and the openings to her cabin, pump room and engine room (Findings 40-43, *infra*, 30a-31a).

II.

Hindsight Rule Disregarded

The Court of Appeals says that the tug captain "continued when he might readily have made safe haven at Sheboygan"; that "to attempt to cross Lake Michigan * * * in the face of increasingly bad weather reports we think negligent"; that when he set out to the east "he had an increasing swell * * * no communication with any vessels on the Lake" with "intermittent heavy snow and northeast to north winds predicted" (*infra*, 10a-11a). The Court of Appeals, who are not licensed navigators, have entered the MARGOT's pilothouse, looked over the shoulder of a well-qualified and long-experienced captain and second-guessed him. The "increasing swell" (11a) may have affected the Court but there is no evidence that it had, or could have been expected to have, any effect on this *seagoing* barge. The absence of communication with other vessels signified nothing to a seaman fully informed by radio weather reports and by watching the behavior of the barge and the tug. Moreover, he knew that if the bargemen had lashed the gear on deck (as he was entitled to expect them to do) and remained below, there was no need to communicate with other vessels. "Intermittent heavy snow" could never harm this seagoing barge, and we have dealt with the predictions as to wind velocity above. For such flimsy reasons the panel overruled not only the judgment of the tug captain but also that of a trial judge of long experience in such cases.

The Court ignored the rule against using hindsight which has been consistently observed for at least sixty years and

right down to the present case. In *M. P. Howlett Inc.* v. *Tug Michael Moran,* 2 Cir., 425 F.2d 619 (1970), cert. den. 400 U.S. 833, the Court said:

> "In faulting the master of a tug for choosing one course of action over others that may have been available in situations requiring judgment under conditions of abnormal stress, we must be careful to 'judge the conduct of the master of a vessel in the light of the circumstances which he faced at that time * * * and not as they may have appeared to one looking back at them several hours or several days later'" (p. 622).

Friendly, C.J., dissenting, described "viewing the master's actions in light of hindsight" as "a wrong conception" (p. 624) and said in addition:

> "By second-guessing the district judge in a case like this, we encourage appeals on what are largely factual issues, thus needlessly produce further work for ourselves, and impair the confidence which the district courts deserve" (p. 624).

As the Court noted in *The George Hughes,* 183 Fed. 211 (2 Cir. 1910):

> "If, then, it appears that the master of the Hughes, when confronted with the complicated problems disclosed by the proofs, exercised his best judgment and navigated with due regard to all the perils surrounding him, we cannot hold the tug liable, even though it should now appear, in the light of subsequent events, that a wiser course might have been adopted" (p. 212).

The cases to the same effect are numerous:

First Circuit:

The H. F. Dimock, 77 Fed. 226, 229-30 (1896).

Second Circuit:

Esso Standard Oil S.A. v. *S.S. Gasbras Sul*, 387 F.2d 573 (1967);
Mamiye Bros. v. *Barber Steamship Lines Inc.*, 360 F.2d 774 (1966);
The Imoan, 67 F.2d 603, 605 (1933);
The Mohegan, 28 F.2d 795, 796 (1928);
The Eastern, 280 Fed. 711, 713 (1922);
The Haven, 277 Fed. 957, 959 (1921);
The W. H. Baldwin, 271 Fed. 411, 413 (1921);
Farrell Lines, Inc. v. *Birkenstein*, 207 F. Supp. 500, 509 (S.D.N.Y. 1962);
The Harold, 287 Fed. 757 (S.D.N.Y. 1922).

Fourth Circuit:

Southern Towing Co. v. *Egan*, 184 Fed. 275 (1910);
The E. V. McCaulley, 189 Fed. 827 (E.D. Va. 1911).

Fifth Circuit:

The Pacific Maru, 8 F.2d 166, 173 (S.D. Ga. 1925).

Sixth Circuit:

United States Steel Corporation v. *Fuhrman*, 407 F.2d 1143 (1969).

III.

Contribution

Having held Moran as well as Seaboard negligent the court ordered the damages divided, not only the physical damage to the barge but also the sums paid in settlement of the death claims. Seaboard has petitioned for a writ of certiorari on this point, now pending as No. 71-913. Contemporaneously with this petition Moran is filing its brief in response to Seaboard's petition, which Moran does not oppose.

This case presents many points of general interest on which there is a considerable division among the lower courts not only with respect to contribution but also what must be required to justify a Court of Appeals in throwing over carefully considered findings below and, at least equally important, the substitution by a landlubber court of its untutored views concerning navigation for the informed and considered judgments of a thoroughly qualified and long experienced master which were found by a particularly capable district judge to be reasonable and not negligent.

CONCLUSION

For the above reasons we submit that a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit to review all the issues in the entire case.

Respectfully submitted,

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